

**United States Department of Labor
Employees' Compensation Appeals Board**

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Trenton, NJ, Employer**

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**Docket No. 15-0913
Issued: March 25, 2016**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 23, 2015 appellant, through counsel, filed a timely appeal of a January 20, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's claim for a schedule award.

On appeal counsel argues that medical evidence submitted establishes entitlement to a schedule award. He also argues that OWCP erred in failing to forward the new medical report to an OWCP medical adviser for review.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 7, 1998 appellant, then a 42-year-old custodian/laborer, filed a traumatic injury claim alleging that he injured his lower back on April 2, 1998 while lifting garbage bags. The claim was accepted for lumbosacral strain.

This case has previously been before the Board. By decision dated November 1, 2002, the Board affirmed a February 7, 2002 hearing representative's decision, which affirmed in part a March 23, 2001 OWCP decision.² In the February 7, 2002 decision, the OWCP hearing representative had reversed the denial of appellant's claim, approved the acceptance of a lumbar strain, and affirmed the denial of his claim for a recurrence of disability. The Board affirmed OWCP's decision that appellant had failed to meet his burden of proof to establish a recurrence of disability beginning December 2, 1999 causally related to his accepted lumbosacral strain. On October 26, 2011 the Board issued an order setting aside an August 4, 2010 hearing representative's decision denying his claim for a schedule award.³ The Board remanded the case to OWCP as it had failed to consider all the relevant medical evidence in the record. The Board noted that the OWCP hearing representative specifically found in its August 4, 2010 decision that Dr. Stanley Askin, a second opinion Board-certified orthopedic surgeon, constituted the weight of the medical opinion evidence as his was the only opinion based upon a review of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The Board noted that the record also contained a November 24, 2009 report from Dr. David Weiss, an examining osteopath specializing in family practice, in which he had updated his prior impairment rating by utilizing the sixth edition of the A.M.A., *Guides* and it was clear that all relevant evidence had not been considered in the denial of appellant's claim for a schedule award. In an order remanding case, dated March 5, 2014, the Board again set aside a March 28, 2013 OWCP decision denying appellant's request for merit review of his claim for a schedule award.⁴ The Board found that OWCP had failed to consider the case as a timely reconsideration request. The Board found that appellant was entitled to a merit review as he was alleging a worsening of his condition based on a November 6, 2012 report by Dr. Weiss. The facts and the law as set forth in the prior appeals are hereby incorporated by reference.

In the November 6, 2012 report, Dr. Weiss, determined that appellant had 22 percent right lower extremity impairment using the sixth edition of the A.M.A., *Guides*. He provided findings on examination and reviewed the medical evidence. Diagnoses included chronic post-traumatic lumbosacral strain/sprain, right lumbar radiculopathy, aggravation of preexisting multilevel lumbar discogenic disease, and progressive lumbar spinal stenosis based on clinical observation. Referencing Table 2 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (*The Guides Newsletter*), Dr. Weiss assigned a class 1 for IV/V motor deficit strength of the right hip flexors L4 nerve root value of five percent. He assigned a grade modifier of 2 for Functional History (GMFH) using Table 16-6, page 516, and a grade modifier 1 for Clinical Studies (GMCS) using Table 16-8, page 519. Dr. Weiss placed the impairment

² Docket No. 02-1319 (issued November 1, 2002).

³ Docket No. 11-0320 (issued October 26, 2011).

⁴ Docket No. 13-1690 (issued March 3, 2014).

Class 1 of the Diagnosis (CDX), which was then adjusted by the grade modifiers for functional history and clinical studies, which yielded a net adjusted grade of 1, for a seven percent impairment of the right lower extremity.

Dr. Weiss then found five percent impairment due to a class 1 IV/V motor strength deficit right extensor hallucis longus due to L5 nerve root using Table 2 of *The Guides Newsletter*. He assigned a grade modifier of 2 for functional history using Table 16-6, page 516, and a grade modifier 1 for clinical studies using Table 16-8, page 519.

Dr. Weiss assigned 1 as the impairment class for the diagnosed condition, which was then adjusted by the grade modifiers to yield a net adjusted grade of 1, for seven percent impairment of the right lower extremity.

Next, Dr. Weiss also assigned class 1 for severe sensory deficit left L5 nerve root value of six percent using Table 2 of *The Guides Newsletter*. He assigned a grade modifier of 2 for functional history and a grade modifier 1 for clinical studies. Dr. Weiss placed the impairment in class 1 for the diagnosed condition, which was then adjusted by the grade modifiers, which a total net adjustment of 1, for seven percent impairment of the right lower extremity.

Finally, Dr. Weiss assigned class 1 moderate sensory deficit left S1 nerve root with a value of four percent using Table 2 of *The Guides Newsletter*. He found functional history as grade 2 and clinical studies as grade 1, which arrived at a total net adjustment of four percent of the left lower extremity. Thus, the final combined value of the right lower extremity was 22 percent (4+6+7+7). Dr. Weiss concluded that maximum medical improvement had been reached on November 6, 2012.

By decision dated June 16, 2014, OWCP denied appellant's claim for a schedule award. It found the medical evidence insufficient to establish that appellant had sustained a permanent impairment causally related to his accepted April 2, 1998 employment injury. OWCP found that Dr. Weiss' report was insufficiently rationalized to establish a causal relationship between the worsening consequential injuries and the accepted employment injury.

On June 20, 2014 counsel requested an oral argument before an OWCP hearing representative, which was held on November 19, 2014.

In a December 15, 2014 supplemental report, Dr. Weiss explained that appellant began suffering low back pain following the April 2, 1998 employment injury which continued into a chronic condition. Diagnoses included chronic lumbosacral sprain/strain with aggravation of preexisting lumbar spine multilevel discogenic disease, and lumbar radiculopathy. In concluding, Dr. Weiss attributed appellant's current impairment to the accepted April 2, 1998 employment injury based on his evaluation and the history appellant provided.

By decision dated January 20, 2015, OWCP hearing representative affirmed the June 16, 2014 decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁸

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁹ As neither FECA nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.¹⁰ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.¹¹ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹²

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹³ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.¹⁴ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁵

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁹ *S.K.*, Docket No. 08-848 (issued January 26, 2009); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *See D.N.*, 59 ECAB 546 (2008); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹¹ 5 U.S.C. § 8101(19).

¹² *J.Q.*, 59 ECAB 366 (2008); *Thomas J. Engelhart*, *supra* note 9.

¹³ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, *Disability and Health (ICF): A Contemporary Model of Disablement*.

¹⁴ A.M.A., *Guides*, pp. 383-419, (6th ed. 2009).

¹⁵ *Id.* at 411.

ANALYSIS

Appellant submitted an updated impairment evaluation performed by Dr. Weiss, who found 22 percent impairment of the right lower extremity due to several spinal nerve root deficits and a supplemental report attributing appellant's current impairment to the April 2, 1998 employment injury. OWCP found the evidence insufficient to establish increased permanent impairment as Dr. Weiss' opinion was insufficiently rationalized to establish a causal relationship between the worsening consequential injuries and the accepted April 2, 1998 employment injury. The Board finds appellant failed to meet his burden of proof to establish entitlement to a schedule award.

In support of his claim for a schedule award appellant submitted a November 6, 2012 report and December 15, 2014 supplemental report from Dr. Weiss. These reports, however, are of limited probative value in that Dr. Weiss did not provide adequate medical rationale in support of his conclusion regarding causal relationship due to the worsening consequential injuries. Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain/sprain, right lumbar radiculopathy, aggravation of preexisting multilevel lumbar discogenic disease, and progressive lumbar spinal stenosis and found 22 percent right lower extremity impairment based on those diagnoses. The Board notes that OWCP has not accepted the conditions diagnosed by Dr. Weiss. For conditions not accepted by OWCP as being employment related, it is appellant's burden to establish to submit rationalized medical evidence sufficient to establish a causal relationship between the additional or consequential conditions and the accepted employment injury.¹⁶ Furthermore, such medical rationale is especially necessary in the present case as OWCP had previously denied his claim as it found that his employment-related injury did not cause a permanent impairment. Dr. Weiss provided no explanation on how the diagnosed conditions were causally related to the April 2, 1998 employment injury in his November 6, 2012 report. The only support Dr. Weiss provided for his conclusion was that his opinion was based on his evaluation and history appellant provided. He did not explain how the additional conditions of right lumbar radiculopathy, aggravation of preexisting multilevel lumbar discogenic disease, and progressive lumbar spinal stenosis were due to the accepted employment injury or a natural progression of the accepted lumbosacral strain. Dr. Weiss failed to provide sufficient medical rationale explaining the causal relationship between the diagnoses of chronic post-traumatic lumbosacral strain/sprain, right lumbar radiculopathy, aggravation of preexisting multilevel lumbar discogenic disease, and progressive lumbar spinal stenosis and the accepted April 2, 1998 employment injury, and thus, his reports are insufficient to establish causal relationship or entitlement to a schedule award.¹⁷ Accordingly, OWCP properly found the medical evidence insufficient to establish entitlement to a schedule award.

On appeal counsel argues that the medical evidence is sufficient to establish appellant's claim for a schedule award and that OWCP erred in failing to forward the medical evidence for review by an OWCP medical adviser. As discussed above, Dr. Weiss' additional reports were insufficient to establish appellant's claim for a schedule award as he failed to explain how the impairment rating and diagnoses of chronic post-traumatic lumbosacral strain/sprain, right lumbar radiculopathy, aggravation of preexisting multilevel lumbar discogenic disease, and

¹⁶ *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁷ *Deborah L. Beatty*, 54 ECAB 340 (2003).

progressive lumbar spinal stenosis found by the doctor were causally related to the accepted April 2, 1998 employment injury. Contrary to appellant's contention, OWCP was not required to forward the case for review by an OWCP medical examiner. OWPC procedures that the claims examiner will ask for review by an OWCP medical adviser to evaluate cases when the case appears to be in posture for a schedule award determination. As OWCP determined that the evidence was insufficient to establish entitlement to a schedule award, it was not required to seek review by an OWCP medical examiner.¹⁸

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that that OWCP properly denied appellant's claim for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 20, 2015 is affirmed.¹⁹

Issued: March 25, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

¹⁹ James A. Haynes, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective November 16, 2015.